Supreme Court, U.S.
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No. 99-987

In The Supreme Court of the United States

PATRICIA A. SMITH,
Petitioner,

v.

COUNTY OF CULPEPER;
CULPEPER COUNTY DEPARTMENT
OF SOCIAL SERVICES;

and

CALVIN L. COLEMAN,
Respondents.

On Petition for *Writ* of *Certiorari* to the
United States Court of Appeals for the
Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR *WRIT* OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether Appellee Calvin Coleman ("Coleman") may be individually liable under Title VII.

2. Whether Appellant Patricia Smith ("Smith") established a claim of quid pro quo sexual harassment.

3. Whether the conduct about which Smith complained was sufficiently "severe and pervasive" as to amount to hostile environment sexual harassment.

4. Whether Smith was constructively discharged.

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PARTIES TO THE PROCEEDING

The Appellees do not disagree with the Appellant's statement of parties to the proceeding.

REFERENCES TO REPORTS OF THIS CASE

The Appellees do not disagree with the Appellant's statement of references to reports of this case.

JURISDICTION OF THIS COURT

The Appellees do not disagree with the Appellant's statement of federal jurisdiction of this Court. However, the issues raised in the Petition do not qualify under any of the circumstances set forth in Rule 10 of the Supreme Court of the United States governing issuance of petitions for certiorari. As discussed infra, all circuit courts deciding the issue agree that there is no individual liability under Title VII. Moreover, the gravamen of the Petition is that the District Court and the U. S. Court of Appeals for the Fourth Circuit erred in finding that the facts adduced by the plaintiff did not amount to hostile environment sexual harassment. Alleged erroneous factual

findings are beyond the normal scope of this Court's review. See Rule 10.

EXCERPTS FROM CONSTITUTIONAL PROVISIONS AND STATUTES

The Appellees do not disagree with the Appellant's excerpts from constitutional provisions and statutes.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition is misleading in four respects:

First, prior to the "road trip" comment, Smith did not find her work environment "borderline abusive" because of frequent use of sexual innuendo and offensive language by Coleman. Petition at 26. Rather, Smith herself commonly used four-letter words, sexual innuendo, and told dirty jokes. JA 135-36. Coleman and Smith both told jokes of a graphic sexual nature. JA 146-47. When an acquaintance of Smith's asked her about foul language, dirty jokes, and inappropriate comments being common at DSS, Smith replied, "that goes on

all the time on our floor any way . . . that's just the way we operate, it is a very friendly relaxed kind of place. . . ." JA 188-89. Thus, Smith associated such remarks not with an offensive workplace, but with a friendly and relaxed workplace.

Second, the theory of the Petition is that the "road trip" comment was some sort of "culminating event" in a course of conduct to which Smith objected. Nothing could be further from the truth. Smith flatly conceded that all of the incidents preceding the "road trip" comment, see Petition, pp. 4-7, were simply routine sex-oriented jokes and byplay that everyone in the DSS office engaged in.

> Q. Is it fair to say that before the February 19th road trip comment, that all the other stuff falls under the heading of the kind of sex-oriented jokes and byplay that happened in the DSS office that everybody engaged in, including you?
>
> A. I did, in fact, engage in that, and I would never admit to anything other than that. It did go on all the time, and I was party to a lot of it and yes, most of it was always done in a playful nature. . . .

JA 169. Repeating that point, Smith testified that prior to the "road trip" comment, she and Coleman "worked together and on a very friendly basis, and I didn't have a problem with it . . ." JA 128.

Third, Smith knew that a "road trip" meant getting funding for DSS programs.[1] Consequently, her complaint about the "road trip" comment being a proposition rests on the words being used as double entendre. Asked if she had heard Coleman use the phrases "taking a road trip" or "going down the road" to mean going to Richmond to get funding from the State government, Smith agreed that "I am sure that I have heard Chip [Coleman] say that as a follow-up or a comment, a

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[1]One of Coleman's duties was to obtain funding for DSS programs. He did this by "going down the road," from Culpeper to Richmond, to meet with State Social Services officials and with members of the General Assembly. Several of Smith's co-workers (and the former Culpeper County Administrator) knew Coleman to use the expressions "road trip" or "going down the road" to mean getting funding from Richmond. JA 297-298, 306, 318, 319.

side comment to talking about finances in relation to the General Assembly." JA 178-79. Indeed, Smith testified with crystal clarity that it was not the words, but the "tone" of Coleman's remark and that it was made with a "little smirk" that made her uncomfortable:

> But at the time the statement was made to me by [Coleman], it was said in a way that made me uncomfortable, it was the — Let me think of the word. I believe it was the tone in which it was said to me, the little smirk that he had at the time it was said that made it different from saying well, we'll go to the General Assembly and find the funds or don't worry, the budget process is not over yet.

JA 124 (emphasis supplied). Thus, Smith knew that Coleman's remark—absent the "tone," and absent the "smirk"—meant going to the General Assembly for funding. Hence, this lawsuit boils down to whether one remark about a "road trip" made with a "tone" and a "smirk" amounts to hostile environment sexual harassment.

Fourth, belying her claim of constructive discharge, Smith testified that what she now claims to be sexual

harassment was one of many reasons for her resignation, having told DSS Board Chairperson Cathy Zielinski "that I had had enough and I was tired of the bulls--t that went on every day." JA 181-82. The colorful noun referred to political disputes between DSS and Culpeper County. Id. Moreover, when Smith resigned on February 28, 1997, she said that her last day of work would be May 30, 1997, fully three months in the future. JA 193. Smith explained that May 30th was the end of the fiscal year for DSS, and she felt that it would be easier for Coleman if she stayed until the end of the fiscal year. JA 108-109.

ARGUMENT

STANDARD OF REVIEW

The Appellees agree with the standard of review set forth by the Appellant.

DISCUSSION

A. Coleman is Not Liable Under Title VII.

Coleman, in his individual capacity, is not liable under

Title VII, as all circuit courts of appeal to have considered the issue have ruled. See Lissau v. Southern Food Svces. Inc., 159 F.3d 177, 180 (4th Cir. 1998), and cases cited therein. Smith errs by contending that the use of the word "agent" in 42 U.S.C. § 2000(e)(b) bespeaks Congressional intent to hold individual supervisors liable. Instead, the word "agent" means merely that the conduct of an employer's agent may suffice to hold the employer liable, under traditional principles of respondeat superior.

B. No Quid Pro Quo Sexual Harassment.

Because Coleman never reduced Smith's salary, demoted her, or otherwise adversely affected the economic terms of her employment, she has failed to establish a prima facie case of quid pro quo sexual harassment as a matter of law. See Burlington Industries v. Ellerth, 118 S. Ct. 2257, 2264-65 (1998)("Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim. . ."). Of course, in the case at bar, there was no threat at

all, merely the "road trip" remark that was, at worst, a double entendre.

C. No Hostile Environment Sexual Harassment.

Smith cannot prove that the alleged harassment was sufficiently severe and pervasive to create an abusive working environment. See Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993), holding that conduct that is not "severe and pervasive enough to create an objectively hostile . . . work environment . . . is beyond Title VII's purview." That holding is in accord with Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986), holding that conduct amounts to actionable sexual harassment only when it is sufficiently pervasive and severe to alter the conditions of the victim's employment and create an abusive working environment.

Indeed, aside from the ambiguous "road trip" comment, Smith admitted that none of the other comments that she attributes to Coleman offended her enough to complain about them. Prior to the "road trip" remark, Smith "worked together

[with Coleman] and on a very friendly basis, and I didn't have a problem with it." JA 128.

To establish a Title VII claim based on hostile environment, a plaintiff must show that the environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998). The Court must "examine the totality of the circumstances," including (i) the frequency of the discriminatory conduct; (ii) its severity; (iii) whether it is physically threatening or humiliating, or a mere offensive utterance; and (iv) whether it unreasonably interferes with an employees' work performance. Harris, 114 S. Ct. at 371. Moreover, to be actionable, the environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the alleged victim did in fact perceive to be so. Id. It hardly bears arguing that a reasonable person would not believe her working

environment to be hostile, that the terms and conditions of her employment had been altered, based solely on one remark, regardless of its "tone" or whether it was said with a "smirk."

Reviewing the applicable Harris criteria: (i) the "road trip" comment was infrequent— in fact it was completely isolated, as Smith conceded that Coleman had never propositioned her before, JA 125; (ii) the remark was plainly not "severe," because Smith testified that it was not the words—which meant getting funding—but the "tone" and the "smirk" that made her uncomfortable; (iii) the "tone" and "smirk" were not physically threatening or humiliating; instead, they were at most, using the diction of Harris, "offensive utterances;" and (iv) although Smith alleges that the "tone" and "smirk" made her uncomfortable, those circumstances— an inflection and a facial expression—did not unreasonably interfere with Smith's work performance, because a reasonable employee, confronted with otherwise innocent remark made with a certain "tone" or "smirk," would not find that her work

environment had suddenly become hostile and abusive— the objective component of the test.

Moreover, the context in which Coleman's "road trip" remark was made was replete with graphic sexual discussions, and sex-oriented jokes and byplay to which Smith was a willing participant. Against that background, an innocent remark made with a "tone" and a "smirk" cannot possibly amount to a change in the terms and conditions of Smith's employment.

Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace, and does not attempt to "purge the workplace of vulgarity." Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430 (7th Cir. 1995). This sensible observation is doubly true when the plaintiff herself actively participated in discussions involving graphic sexual remarks and four-letter words. See e.g., Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991)(plaintiff who engaged in inappropriate remarks did not experience hostile

environment).

D. No Constructive Discharge.

Smith's resignation was not a constructive discharge. Constructive discharge requires proof of two elements: deliberateness of the employer's action, and intolerability of working conditions. Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); Paroline v. Unisys Corp., 879 F.2d 100, 113-14 (4th Cir. 1989)(Wilkinson, J. dissenting), adopted by 900 F.2d 27 (4th Cir. 1990)(en banc). Intolerability is assessed by the objective standard of whether a reasonable person in Smith's position would have felt compelled to resign, that there was no choice but to resign. Bristow, 770 F.2d at 1255. This is essentially the same standard applied by the NLRB. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984)(constructive discharge occurs when employer "purposefully creates working conditions so intolerable that the employee has no option but to resign").

Smith cannot satisfy that standard. First, Smith's resignation letter gave three months' notice. JA 193. That fact alone negates any claim that her workplace was "intolerable." See Smith v. Bath Iron Works Corp., 943 F.2d 164, 167 (1st Cir. 1991)(constructive discharge requires that employee resign within a reasonable time after workplace becomes intolerable). It offends logic to suggest that an "intolerable" workplace may be tolerated for three months, especially since Smith testified that her reason for giving three months' notice was because it would be easier for Coleman if she stayed until the end of the fiscal year. After Smith changed her mind, and decided to quit on one week's notice, that was not the result of changed conditions that suddenly rendered her workplace intolerable. Finally, Smith testified that what she now claims to be sexual harassment was one of many reasons for her resignation, having told DSS Board Chair Zielinski "that I had had enough

and I was tired of the bulls--t that went on every day," referring to inter-agency politics. JA 181-82.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

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